possession upon which they based their decision. Thus it is more appropriately described as a subjective test.' Despite Mr Almeida's contention that the preventive Act is not a security law, I am of the view that the preventive Act here is also a preventive detention law as can be seen from the long title, preamble and body of the said preventive Act and based on these two very recent decisions, this court cannot now be asked to inquire into the sufficiency of the reasons for the belief for the necessity of the detention as stated in the relevant affidavits which had resulted in the said detention orders on the three applicants.

As regards the deputy minister, he had categorically denied at para 5 of his affidavit that he did not apply his mind to the facts of the case. He had also had the benefit of the complete report from the police and the report of the inquiry officer under s 5(4) of the preventive Act. Despite the submissions of Mr Almeida, I agreed with senior federal counsel that there was no legal requirement to append the said reports or to disclose the identity of the inquiry officer.

As can be seen from the affidavit of PPP Mohd Yunus bin Haji Mohamed, the detention orders were served at 11.45 pm on the date they were issued, ie 2 November 1987 under s 9(1) of the preventive Act. All three applicants were told of their rights to make representations to the Advisory Board under s 9(2) of the preventive Act and were furnished with grounds on which the orders were made as required by that section. According to Cik Zaleha, the Advisory Board heard their applications on 9 and 12 December 1987 and that pursuant to recommendations of the Advisory Board, the said orders had been confirmed by the Yang di-Pertuan Agong under s 10 of the preventive Act.

It has been held in earlier cases that the courts may review an order for preventive detention if there is an allegation that a condition precedent for the making or the continuance of the said order has not been complied with, or if there is an allegation that the grounds of detention stated in the said order do not fall within the scope and ambit of that particular legislation under which the said order is made, or if there is an allegation of mala fides, but on the considerations stated above, this court is of the view that all the seven grounds stated by the three applicants in their respective notices of motion are devoid of merit. In the consequence, I hold that all three applications should be dismissed.

Applications dismissed.

Solicitors: *SA Almeida.*

Reported by *Prof Ahmad Ibrahim*

Wee Tiang Kheng & Ors v Ngu Nii Soon & Ors

HIGH COURT (SIBU) – SUIT NO 154 OF 1985
CHONG SIEW FAI J
12 SEPTEMBER 1988

Civil Procedure – Joinder of parties – Sole proprietorship joined with sole proprietor as parties in tenancy action – Sole proprietorship not a legal persona and therefore not capable of holding tenancy – Whether such joinder was oppressive and prejudicial to defence – Interpretation of O 77 r 9 of the Rules of the High Court 1980 – Rules of the High Court 1980, O 15 r 6(2)

Civil Procedure – Party wrongly made a co-plaintiff in tenancy action – Whether proper party could be added under O 15 r 6(2) of the Rules of the High Court 1980 – Discretion of court – Merits of case – Rules of the High Court 1980, O 15 r 6(2)

Landlord and Tenant – Mesne profits – Dispute on mesne profits awarded under default judgment – Mesne profits twice the alleged monthly rental – No evidence introduced to show that alleged monthly rental was the agreed rent – Burden on landlord to establish that mesne profits claimed was reasonable and ought to be granted

This was an application by the second and third defendants to set aside the judgment in default of defence obtained by the plaintiffs against the first, second and third defendants. Under the judgment the three defendants were ordered, inter alia, to give up certain portions of the shophouse of which the plaintiffs were the registered proprietors and to pay the plaintiffs mesne profits at $9,000 per month till possession was delivered up.

The first defendant was the monthly tenant of the shophouse, the second defendant firm was the subtenant of the first defendant and the third defendant was the sole proprietor of the second defendant firm. In their application to set aside, the second and third defendants submitted that: (a) O 77 r 9 of the Rules of the High Court 1980 did not enable the plaintiffs to join both the second defendant firm and its proprietor as parties in this action and that in so doing it was oppressive, unfair, embarrassing and prejudicial to the defence as the second defendant firm, not being a legal persona , was not capable of holding any tenancy and there was no basis in law to name it as a party to the proceedings; (b) the first named plaintiff, not being a registered co-proprietor of the shophouse, has no reasonable cause of action against them and the judgment is therefore bad; that judgment on $9,000 as mesne profits was unsustainable because the plaintiffs' allegation of $4,500 per month as the monthly rental was not the agreed rent. In relation to the second submission of the defendants', the plaintiffs contended that even if a party had been wrongly or improperly made a co-plaintiff, he could be removed and the proper party added under O 15 r 6(2) of the Rules of the High Court 1980.

Held, allowing the application:

(1) Order 77 rule 9 makes a person carrying on business within the jurisdiction in a name or style other than his own name liable to be sued in that name or style as if it were the name of a firm. It is a permissive provision. It does not restrict the person to be sued only in that name or style. In the instant case, it has not been shown in what way it was oppressive, unfair, embarrassing and prejudicial to the third defendant on account of his being sued in the manner in this action such that the default judgment ought on that account to be set aside.

(2) The default judgment, which had been perfected, was, having regard to its terms, a final judgment. No formal or proper application under O 15 r 6(2) was made. Having regard to all the facts and circumstances, the court does not consider it a fair and proper case for it, on its own motion, to exercise the discretion by granting the relief to the plaintiffs.

(3) A plaintiff may claim mesne profits at a rate higher than the rate of the agreed rent. However, if he does so or the indorsement of claim does not disclose the amount of the agreed rent, the practice is that judgment in default can only be entered for mesne profits to be assessed. The burden lies on the plaintiff to adduce evidence to establish that the higher rate as claimed is reasonable and ought to be granted. In the instant case, not only was the allegation of $4,500 per month in the statement of claim not the agreed rent, the plaintiffs also claimed twice the amount of $4,500, ie $9,000 per month. Therefore the plaintiffs in effect were claiming as mesne profits a great deal more than what the plaintiffs themselves regarded as the open market value or rack rent which on the evidence already far exceeded the agreed rent. The default judgment ought in the interest of justice be set aside.

Cases referred to

1 *Madan Lal & Anor* v *Ho Siew Bee* [1983] 1 MLJ 105 (distd)
2 *Jones & Saldanha* v *Gurney* [1913] WN 72 (refd)
3 *The Duke of Buccleuch* [1892] P 201; 40 WR 455 (distd)
4 *Abbey Panel & Sheet Metal Co Ltd* v *Barson Products* [1947] 2 All ER 809 (distd)
5 *GL Baker Ltd* v *Barclays Bank Ltd* [1956] 3 All ER 519 (distd)
6 *Southport Tramways Co* v *Gandy* [1897] 2 QB 66 (distd)

Legislation referred to

Civil Law Act 1956 s 28(4)(a)
Rules of the High Court 1980 O 15 r 6(2), O 19 r 9, O 77 r 9

Chew Peng Hui for the plaintiffs.
Stephen Chung for the second and third defendants.

Cur Adv Vult

Chong Siew Fai J: This is an application by the second and the third defendants to set aside the judgment in default of defence dated 7 October 1985 obtained by the plaintiffs against the first, second and third defendants. Under the judgment, the three defendants were ordered to give up to the plaintiffs certain portions of the shophouse as therein defined (these portions are hereinafter referred to as 'the premises'), to pay the plaintiffs mesne profits at $9,000 per month from 1 June 1985 till possession is delivered up and costs $255.

The basis of the plaintiffs' claims as disclosed in the statement of claim is that they are the registered proprietors of the shophouse, that the first defendant was their monthly tenant respecting the premises, that the second defendant firm of which the third defendant is the sole proprietor is the subtenant of the first defendant, that the tenancy of the first defendant having been duly terminated on 30 June 1985 by a notice to quit dated 24 May 1985 and the defendants wrongfully remaining in occupation of the premises, the plaintiffs are entitled to the reliefs as claimed in the action. The plaintiffs did not aver or show what the monthly rental for the tenancy was. Paragraph 7 of their statement of claim, however, alleges: 'The monthly rental of the premises is $4,500.' On the other hand, there is more specific assertion by the defendants that the rental was $206 per month (see para 5 of the proposed defence and counterclaim annexed to Stephen Chung's affidavit made on 9 October 1985). The plaintiffs, however, claimed and had accordingly mesne profits at $9,000 per month entered in the default judgment.

For the second and the third defendants it was firstly submitted that O 77 r 9 did not enable the plaintiffs to join both the second defendant firm and its proprietor (third defendant) as parties in this action, that in so doing it was oppressive, unfair, embarrassing and prejudicial to the defence and that the second defendant firm not being a legal persona was not capable of holding any tenancy and there was no basis in law to name it as a party to the proceedings. *Madan Lal & Anor* v *Ho Siew Bee*[1] was cited in support.

Order 77 r 9 makes a person carrying on business within the jurisdiction in a name or style other than his own name liable to be sued in that name or style as if it were the name of a firm. It is a permissive provision. It does not restrict the person to be sued only in that name or style. In the instant case it is not disputed that the third defendant Tiong Ai King was and is the sole proprietor of the second defendant firm. It has not been shown in what way it was oppressive, unfair, embarrassing and prejudicial to Tiong on account of his being sued in the manner in this action such that the default judgment ought on that account to be set aside. The claim of the plaintiffs against the second and the third defendants is that they are trespassers. Even accepting that the claim is one of tenancy and that the second defendant firm cannot hold a tenancy, there is nothing to prevent the judgment from being enforced against the third defendant who, as admitted, was and is the sole proprietor of the second defendant firm. In *Madan Lal & Anor* v *Ho Siew Bee*,[1] the situation was different. There the issue was whether the name of a partnership firm is or can be the tenant. More importantly, there the partners of the partnership firm were not made parties to the proceedings before the Rent Tribunal.

I find no merits in this ground.

Another contention is that the first named plaintiff Wee Tiang Kheng, not being a registered co-proprietor of the shophouse as alleged in the statement of claim, has no reasonable cause of action against the second and the third defendants and the judgment is therefore bad.

It is not disputed that at all material times the first named plaintiff Wee Tiang Kheng was not and is not a

registered co-proprietor of the shophouse. He was and is a donee of the power of attorney created by one Julian Wee Lip Jin. On the evidence, Wee Tiang Kheng clearly was and is not a registered co-proprietor of the shophouse as alleged in the statement of claim. In *Jones & Saldanha* v *Gurney*[2] an attorney appointed under a power of attorney sued as a co-plaintiff. It was held that the statement of claim showed no cause of action in the attorney and that his name was improperly joined. It appears clear that a person authorized to sue and suing under a power of attorney on behalf of his principal has to sue in the name of the principal: *Jones & Saldanha* v *Gurney*.[2]

For the plaintiffs it was contended that even if a party had been wrongly or improperly made a co-plaintiff, he could be removed and the proper party added. Reliance was placed on O 15 r 6(2) and the case of *The Duke of Buccleuch*.[3] The addition of a party under O 15 r 6(2)(b) may be made in order that all matters in dispute may be effectually and completely determined and adjudicated upon. The court may also add as a party any person between whom and any party to the cause or matter there exists a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the court's opinion, it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter. Furthermore, the move to remove and/or to add parties may be on application or on the court's own motion. In *The Duke of Buccleuch*,[3] removal and addition of parties were allowed where the judgment was not final in that damages had yet to be assessed. In our instant case, the default judgment, which had been perfected, was, having regard to its terms, a final judgment. No formal or proper application under O 15 r 6(2) was made. The relief was suggested on behalf of the plaintiffs in the course of arguing the defendants' present application to set aside the judgment. Having regard to all the facts and circumstances including the point on mesne profits which will be dealt with next, I do not consider it a fair and proper case for the court on its own motion to exercise the discretion by granting the relief to the plaintiffs as proposed.

Another complaint on the judgment are the mesne profits. Mesne profits are in the nature of damages for trespass. A tenant is liable to pay it if he remains in occupation or otherwise keeps the landlord out of the premises after his tenancy has been lawfully terminated or forfeited. In the case of the second and the third defendants, I would, for the purpose of this application, assume that they are trespassers as pleaded.

As has been pointed out, the plaintiffs in the statement of claim stated: 'The monthly rental of the premises is $4,500.' On the evidence, this could not have been the agreed monthly rental between the plaintiffs and the first defendant or between the plaintiffs and the second and third defendants who, as pleaded, were the subtenants. A plaintiff may, of course, claim mesne profits at a rate higher than the rate of the agreed rent. However, if he does so or the indorsement of claim does not disclose the amount of the agreed rent, the practice is that judgment in default can only be entered for mesne profits to be assessed. (See *The Supreme Court Practice 1988*, Vol 1, para 13/4/5, last sub-paragraph.) In such a case, it can, I think, be taken as a rule of practice, if not of law, that the burden lies on the plaintiff to adduce evidence to establish that the higher rate as claimed is reasonable and ought to be granted. In our instant case, not only that the allegation of $4,500 per month in the statement of claim was not the agreed rent, the plaintiffs also claimed twice the amount of $4,500, ie $9,000 per month. Therefore the plaintiffs in effect were claiming as mesne profits a great deal more than what the plaintiffs themselves regarded as the open market value or rack rent which on the evidence already far exceeded the agreed rent.

Counsel for the plaintiffs cited *Abbey Panel & Sheet Metal Co Ltd* v *Barson Products*.[4] That case was in the reverse position. There the claims included a liquidated demand and interlocutory judgment signed as a result of the defendants' failure to appear was held to be good. In our instant case when the writ and statement of claim are examined and tested against the evidence, my view is that the default judgement ought in the interest of justice to be set aside.

Next, *GL Baker Ltd* v *Barclays Bank Ltd*[5] was cited particularly the judgment at p 521 D-E in support of the arguments that the form of judgment (final or interlocutory) to be entered depended upon the manner the writ was indorsed and that final judgment could be entered if a rate had been stated as damages for mesne profits. In my view, *GL Baker Ltd*[5] calls for a different consideration. There, there were specific allegations that the sums claimed were 'the property of the plaintiffs' or 'the plaintiffs' property fraudulently converted' by the defendant.

Reference was also made to two passages in *Southport Tramways Company* v *Gandy*[6] at p 69. I find them to be of no assistance. They relate to the question of the soundness or otherwise of the writ for the purpose of an O 14 application, ie whether or not the writ was specially indorsed.

Counsel for the plaintiffs also referred to the second sub-paragraph of para 13/4/5 in *The Supreme Court Practice 1985*, Vol 1, and contended that in a claim for mesne profits final judgment in a liquidated sum could be entered. The said second sub-paragraph shows that an important element must be present for the entry of such a judgment, ie that the mesne profits claimed are at a rate which is the same as the agreed rent of the premises. The

claim of $9,000 per month in the present action was not the agreed rental between the parties.

The plaintiffs further contended that their claim was based on s 28(4)(a) of the Civil Law Act 1956. Under the said s 28(4)(a), a landlord may claim against a tenant who holds over after the determination of the tenancy, double the amount of the rent or double the value during the period of detention of the premises so detained. In the instant case, however, the claim of $9,000 per month is, as stated earlier, not double rent nor has it been pleaded as double value. The argument, therefore, is untenable.

It was urged upon me that should the judgment on mesne profits be held unsustainable, the default judgment may under O 19 r 9 be set aside in part. Having regard to the various unsatisfactory features stated above, I am not prepared to do so. I allow the application. The whole judgment in default dated 7 October 1985 in this action so far as affecting the second and the third defendants is hereby set aside.

As regards costs, though the default judgment is for the above reasons set aside, the second and the third defendants were not entirely without fault in that the time limited for service of defence had expired when the default judgment was entered. In the circumstances, I think it fair and reasonable that the costs of and occasioned by the entry of the judgment and of its setting aside including the costs of this application be costs in the action.

Application allowed.

Solicitors: *Battenbery & Talma* ; *Stephen Chung Advocates.*

Reported by *Ng Sheau Jiuan*

Patto a/l Perumal v Menteri Hal Ehwal Dalam Negeri & Anor

HIGH COURT (PENANG) – CRIMINAL APPLICATION NO 54-9-88
WAN ADNAN J
27 AUGUST 1988

Administrative Law – Detention by order of minister under statute – Whether legal – Whether power exercised mala fide or improperly or for a collateral or improper purpose – Subjective satisfaction of minister as regards grounds for detention – Whether subject to judicial review – Statement of allegations of fact signed by officer under direction of minister – Whether proper – Delay in making order – Whether satisfactory explanation given – Internal Security Act 1960, ss 8 & 11

Preventive Detention – Detention by order of minister under statute – Whether legal – Whether power exercised mala fide or improperly or for a collateral or improper purpose – Subjective satisfaction of minister as regards grounds for detention – Whether subject to judicial review – Statement of allegations of fact signed by officer under direction of minister – Whether proper – Delay in making order – Whether satisfactory explanation given – Internal Security Act 1960, ss 8 & 11

The applicant was detained pursuant to an order made by the Minister of Home Affairs under s 8(1) of the Internal Security Act 1960 ('the Act'). Pursuant to s 11(2)(b) of the Act, the grounds for the detention as furnished in a written statement were that since June 1980 till his arrest on 27 October 1987, the applicant had conducted activities which had inflamed the racial feelings of the people of various races in the country and that such activities could have caused a threat to the security of the country. Pursuant to the same provision of the Act, the statement also carried the allegations of fact on which the order was based.

The applicant applied for a writ of habeas corpus ordering his release from detention. He denied that he had acted in any manner or had been about to act or likely to act in any manner prejudicial to the security of the country or any part thereof or to the maintenance of essential services therein or to the economic life thereof. The applicant alleged that the power of the minister to make the order had been exercised mala fide or improperly or made for a collateral or ulterior purpose. He contended that all the allegations of fact were taken out of context and did not reflect the true purport. He also said that the allegations of fact were unfounded, improper, unlawful, baseless, infantile, vague, unclear, illegal, ridiculous, frivolous, an abuse of executive power, and remote in point of time. The applicant contended that the minister did not apply his mind subjectively in the proper manner and that the minister had acted mechanically like a robot in signing the detention order. Another complaint was that the statement of the allegations of fact were not signed by the minister and that it should have been signed by him.

Held, dismissing the application:

(1) It is for the detaining authority to prove the legality of the detention. Once that is proved it is for the applicant to show that the power to detain had been exercised mala fide or improperly or made for a 'collateral' or 'ulterior' purpose. The court will not inquire into the sufficiency, relevancy or otherwise of the allegations of fact. Whether or not the facts on which the order of detention is based are sufficient or relevant is